

Message Text

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ACTION SCI-06

INFO OCT-01 IO-14 ISO-00 ACDA-19 CIAE-00 INR-10 L-03

NSAE-00 NSC-07 RSC-01 FEA-02 CPR-02 EB-11 AF-10

ARA-16 EA-11 EUR-25 NEA-10 DRC-01 /149 W

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R 131455Z MAR 74

FM USMISSION IAEA VIENNA

TO SECSTATE WASHDC 4086

INFO AEC GERMANTOWN

UNCLAS SECTION 1 OF 2 IAEA VIENNA 2236

E.O. 11652: N/A

TAGS: IAEA, TECH

SUBJECT: DRAFT MASTER SUPPLY AGREEMENT

REF: IAEA VIENNA 1941 AND PREVIOUS

SUMMARY. MISSION DISCUSSED SUBJECT AGREEMENT WITH AGENCY WHICH HAS PROVIDED SEVERAL EDITORIAL/STYLISTIC CHANGES. AGENCY LAWYERS INDICATE THAT PARA 14 UNACCEPTABLE. MISSION INCLINED GO ALONG DELETION PARA 14. ACTION REQUESTED U.S. VIEWS. END SUMMARY.

1. MISOFFS INFORMALLY DISCUSSED WITH AGENCY STAFF REVISED DRAFT MASTER AGREEMENT GOVERNING SALES OF SOURCE, BY-PRODUCT AND SPECIAL NUCLEAR MATERIALS FOR RESEARCH PURPOSES, WHICH WAS FORWARDED BY FRIEDMAN (AEC) -GABBERT LETTER DATED FEB 21, 1974.

2. AGENCY STAFF BELIEVE REVISED DRAFT CONSIDERABLY IMPROVED, ALTHOUGH FOLLOWING EDITORIAL/STYLISTIC CHANGES HAVE BEEN SUGGESTED, WHICH MISSION BELIEVES ARE ACCEPTABLE. (AS ANTICIPATED, AGENCY STAFF STILL HAVE DIFFICULTY IN ACCEPTING PARA 14, DESPITE OUR EFFORTS TO PERSUADE THEM OTHERWISE. THIS IS DISCUSSED BELOW):

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A. FIRST PREAMBULAR PARA, LINE 6, CHANGE "HEREIN

IN PARENTHESIS TO "HEREINAFTER".

B. FIRST PREAMBULAR PARA, LINE 10, ADD ", AS AMENDED"
AFTER DATE OF AGREEMENT FOR COOPERATION.

C. REFER TO "SUPPLEMENTAL CONTRACT" IN LOWER CASE
THROUGHOUT TEXT.

D. PARA 2, LINE 1, INSERT "OF" AFTER "DELIVERY".

E. PARA 3, LINES 1 AND 12, CHANGE CAPITAL "P" IN
"PARAGRAPH" TO LOWER CASE.

F. PARA 3, LINE 7, DELETE "THIS" (FIRST WORD ON
PAGE 2) AND SUBSTITUTE "EACH SUPPLEMENTAL" BEFORE "CONTRACT".

G. PARA 5(6), LINE 5, CHANGE "COMMISSION'S" TO
"SELLER'S".

H. PARA 7, LINE 2, DELETE "AFTER" AND SUBSTITUTE
"FROM THE". IN FIRST PORTION LINE 5, REVISE TO READ:
"DAYS FROM THE DATE OF THE INVOICE..." CHANGE "COMMISSION".
TO "SELLER" IN LINE 7. REVISE MIDDLE PORTION LINE 8 TO
READ: "...FROM THE DATE OF THE INVOICE EXCEPT THAT,
WHENEVER..."

I. PARA 9, DELETE LAST SENTENCE (AS AGREED IN RECENT
US/IAEA/MEXICO SUPPLY AGREEMENT).

J. PARA 11, LINE 2, CHANGE "SUPPLEMENTARY" TO
"SUPPLEMENTAL".

K. PARA 13, LINE 1 AND 2, INSERT COMMAS BEFORE
AND AFTER CLAUSE "WHICH IS NOT SETTLED BY MUTUAL
AGREEMENT OF THE PARTIES". IN THE FIRST LINE OF BOTH SUB-
PARA (A) AND (B), DELETE "TO THIS CONTRACT". IN LINE 5
OF LAST PART THIS PARA (PENULTIMATE SENTENCE), INSERT
"FINAL AND" BEFORE "BINDING ON ALL PARTIES," (AS AGREED
IN US/IAEA/ MEXICO SUPPLY AGREEMENT).

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L. INSERT NUMBER "1" BEFORE SECOND PREAMBULAR
PARAGRAPH AND RENUMBER ALL SUCCEEDING PARAS EXCEPT
NUMBER 15.

M. IN DRAFT SUPPLEMENTAL CONTRACT ATTACHED, INSERT
"OF AMERICA" AFTER "UNITED STATES" IN LINES 5 AND 10 OF
SECOND PARAGRAPH AND INSERT COMMAS BEFORE AND AFTER CLAUSE
"THE CUSTOMER SHALL NOTIFY THE PURCHASER OF THE AMOUNT

THEREOF AND OF THE DATE AND METHOD OF SHIPMENT AND" IN
LINES 8 AND 9 IN SAME PARA. ADD COMMA AFTER "OF AMERICA"
IN LINE 10.

3. RE PARA 14, DURING FIRST DISCUSSIONS ON REVISED DRAFT,
AGENCY LAWYERS SAID THAT AGENCY COULD NOT RPT NOT ACCEPT
"UNKNOWN LIABILITY," WHICH THEY BELIEVE THIS PARA WOULD ENTAIL, NOR
SUBJECT ITSELF TO JURISDICTION OF ANY STATE. MOREOVER, THEY
INDICATED THAT AGENCY WAS ENTITLED TO CERTAIN IMMUNI-
TIES UNDER ITS AGREEMENT ON PRIVILEGES AND IMMUNITIES
OR, IN CASE OF U.S., INTERNATIONAL ORGANIZATIONS
IMMUNITIES ACT. FURTHER, SIMILAR PROVISIONS PROPOSED BY
OTHER MEMBER STATES HAVE BEEN REJECTED IN PAST, AND IT
WOULD CAUSE SERIOUS DIFFICULTIES TO CHANGE AGENCY'S
POSITION NOW. THEY ALSO ARGUED THAT THERE ARE OVER
100 MEMBER STATES, AND IMPOSSIBLE SITUATION WOULD BE
CREATED IF AGENCY WERE BOUND BY AGREEMENTS TO ACCEPT INTERPRETATIONS
OF LAWS OF EACH OF THEM. FACT THAT EURATOM HAD ACCEPTED
SIMILAR PROVISION IN ITS AGREEMENTS WITH USAEC IS
NOT RPT NOT IN THEIR VIEW, RELEVANT TO AGENCY'S POSITION.

4. MISSION SUBSEQUENTLY STUDIES MATTER IN LIGHT OF
AGENCY'S OBJECTIONS, AND CONCLUDED THAT AEC AND AGENCY
APPARENTLY VIEW TRANSACTIONS UNDER AGREEMENT IN
DIFFERENT LIGHT, I.E., WHETHER THEY ARE REGARDED AS
ACTS JURE GESTIONES (PRIVATE ACTS) OR ACTS JURE IMPERII
(PUBLIC ACTS) AS NOTED IN PARA 26.4.3 (PAGE 907) OF
PAUL SZASZ'S BOOK ON "THE LAW AND PRACTICES OF THE
INTERNATIONAL ATOMIC ENERGY AGENCY, AGENCY HAS ALWAYS
ASSUMED THAT ITS AGREEMENTS WITH STATES AND OTHER
INTERNATIONAL ORGANIZATIONS ARE GOVERNED BY INTERNATIONAL
LAW, UNLESS SPECIFIED OTHERWISE, EVEN IF INSTRUMENT
RELATES TO PRIMARILY COMMERCIAL TRANSACTION, SUCH AS
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UNCLAS SECTION 2 OF 2 IAEA VIENNA 2236

SALE OF NUCLEAR MATERIALS. THUS, WHILE AEC PROBABLY VIEWS TRANSACTIONS UNDER SUPPLY AGREEMENTS AS COMMERCIAL-TYPE TRANSACTIONS (ACTS JURE GESTIONES), AGENCY APPEARS REGARD THEM AS GOVERNMENT-TO-GOVERNMENT-TYPE TRANSACTIONS (ACTS JURE IMPERII).

5. IN ORDER TO SIDESTEP QUESTION OF IMMUNITY, MISSION INFORMALLY SUGGESTED TO AGENCY, AS COMPROMISE, THAT SECOND SENTENCE BE ADDED TO THIS PARA, WHICH WOULD READ: "THIS PROVISION,

HOWEVER, SHALL NOT CONSTITUTE A WAIVER BY THE PURCHASER OF ANY PRIVILEGE, EXEMPTION OR IMMUNITY FROM SUIT OR ANY OTHER FORM OF JUDICIAL PROCESS." AFTER COUPLE OF DAYS INTERNAL STUDY THIS FORMULATION, AGENCY LAWYERS RESPONDED THAT, UNFORTUNATELY, THEY SITLL COULD NOT RPT NOT ACCEPT THIS PARA, EVEN AS MODIFIED, SINCE IT WOULD HAVE EFFECT OF LIMITING SCOPE OF ARBITRAL TRIBUNAL, WHICH IN EVENT OF DISPUTE, WOULD BE ESTABLISHED PURSUANT TO PARA 13 OF AGREEMENT.

6. ON BASIS OUR LENGTHY DISCUSSIONS WITH AGENCY LAWYERS, MISSION BELIEVES IT WILL BE VERY DIFFICULT INDEED TO PERSUADE AGENCY TO ACCEPT PROVISION ALONG LINES PARA 14, IF IT CAN BE DONE AT ALL. SINCE, AS NOTED PARA 2, STATE 9842, AEC BELIEVES U.S. LEGAL RULES PROBABLY APPLICABLE IN ANY EVENT, WE QUESTION WHETHER IT WILL BE WORTH THE EFFORT TO CONTINUE PRESSING AGENCY UNCLASSIFIED

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ON THIS PARA.

7. IN VIEW FOREGOING, AND SINCE WE ASSUME EDITORIAL/STYLISTIC CHANGES POSE NO RPT NO PROBLEMS FOR AEC, WE ARE INCLINED TO RECOMMEND THAT WE GO ALONG WITH AGENCY'S PROPOSED DELETION PARA 14, AND THUS BE IN POSITION AGREE ON FINAL TEXT PROMPTLY, WHICH WOULD THEN BE READY FOR BG CONSIDERATION IN JUNE. ADVISE. PORTER

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